Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-53

IN THE

Supreme Court of the United States

October Term, 1989

MISSOURI DIVISION OF TRANSPORTATION,
ALABAMA PUBLIC SERVICE COMMISSION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITION FOR CERTIORARI

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CASILLAS PRESS INC. – 1717 K STREET, NW, WASHINGTON DC – 223-1220

3 pp

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BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to U.S. Sup. Ct. Rule 19.6, the National Association of Regulatory Utility Commissioners (NARUC), intervenor in the proceeding below, hereby responds in support of the petition of the Missouri Division of Transportation and the Alabama Public Service Commission for a writ of certiorari to the United States Court of Appeals for the Eighth

Circuit.

OPINION BELOW

The opinion of the Court of Appeals, entitled Middlewest Motor Freight Bureau et al. v. Interstate Commerce Commission et al., (Pet. App. 1-9) is reported at 867 F.2d 458 (8th Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1989. A petition for rehearing and rehearing en banc was denied on April 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

STATEMENT

Chemtech Industries, Inc. purchases chemicals in bulk from sellers outside the State of Missouri for delivery to its distribution facility in St. Louis. In June 1986, Chemtech began to use Matlack, Inc.,

a contract carrier operating in interstate commerce pursuant to operating rights granted by the Interstate Commerce Commission (ICC or the Commission), to transport its chemicals from the St. Louis facility to final delivery points within the State of Missouri. Shortly thereafter, the State of Missouri commenced enforcement proceedings against Matlack on the ground that the carrier, who possessed no authority from the State to provide intrastate motor carrier service, was operating unlawfully to the extent that it provided carriage from St. Louis to other points wholly within the State.

In July 1986, Matlack filed a petition for a declaratory order with the ICC requesting a ruling that the transportation services it provided Chemtech within the State of Missouri were in interstate commerce and therefore authorized by its interstate operating rights. By decision served June

17, 1987 (Pet. App. 10-25) and reaffirmed on rehearing by decision served December 31, 1987 (Pet. App. at 27-40), the Commission, by a vote of 3-2, granted Matlack's petition. Finding that the service Matlack provided in Missouri was "part of a continuous interstate movement" (Pet. App. at 22), the ICC ruled that the State of Missouri, through its Division of Transportation, was without jurisdiction to regulate the service.[1] Moreover, the Commission determined that because transportation of the chemicals into the St. Louis facility was exempt from its regulatory authority, "Federal jurisdiction over continuing outbound movements does not attach" to shipment to Missouri points. (Pet. App. at 22).

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[1] The Missouri Division of Transportation (MDOT), one of the Petitioners herein, is a member agency of the NARUC, as is the Alabama Public Service Commission (APSC), the other Petitioner.

In reaching its decision, the Commission relied heavily, if not exclusively, on its finding that Chemtech "intended for its shipments to be in interstate commerce." (Pet. App. at 17-21). In so doing, the ICC rejected claims based on this Court's decision in Atlantic Coast Line R.R. v. Standard Oil Co. of Kentucky, 275 U.S. 257, 269 (1927), that once the bulk chemicals were delivered to the St. Louis facility, the character of the commerce at issue changed from interstate to intrastate. (Pet. App. at 18-19).

On review, the U.S. Court of Appeals for the Eighth Circuit affirmed the Commission's declaratory ruling. (Pet. App. at 1-9).[2] Relying on Service Storage & Transfer Co. v. Virginia, 359 U.S. 171 (1959), the Court below rejected claims that the ICC was

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[2] As noted supra at 1, the NARUC was a party intervenor in the Eighth Circuit litigation. See Pet. at ii.

without jurisdiction to declare that the MDOT's authority to regulate Matlack's Missouri transportation services was preempted. (Pet. App. at 4-5). On the merits, the Court affirmed the ICC's finding that the Missouri transportation provided by Matlack was interstate in character. Applying the "narrow standard" of judicial review found in the Administrative Procedures Act (5 U.S.C. 706 (2)(A),(E)), the Court held that "we cannot say that the ICC's finding that the essential character of the shipment is interstate commerce is arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence on the record as a whole." In reaching this conclusion, the Court accepted the ICC's view that Atlantic Coast Line, supra, was distinguishable on the issue of shipper intent. (Pet. App. at 6-8).[3] Rehearing and

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[3] As Petitioners correctly note, the Eighth Circuit's opinion failed to address several procedural and substantive issues

rehearing en banc were subsequently denied. (Pet. App. at 26-27).

REASONS FOR GRANTING THE WRIT

This Case Raises Important Issues of Federal Law Which Are of Broad National Significance

1. The decision under review by the Eighth Circuit is the first of many recent ICC decisions concerning the "character of commerce" to reach this Court. Indeed, it is now quite clear that in 1986, a majority of the Commission began a campaign to reclassify intrastate transportation as interstate commerce in order to preempt State

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raised by the parties below: that the Commission had failed to provide adequate notice of its declaratory proceeding, that the ICC's refusal to permit discovery, factfinding and a hearing violated the parties' rights to due process, and that the case should be analysed as a matter of Federal preemption of State authority to regulate intrastate activities. Pet. at 10.

regulation on a case-by-case basis.[4] The Commission's Armstrong decision (see n. 4, infra) was the first "declaration" that sought to preempt State motor carrier regulatory authority, but far from the last.[5]

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[4] State of Texas v. United States, 866 F.2d 1546 (5th Cir. 1989). The Court of Appeals upheld an ICC decision entitled Armstrong, Inc.--Transportation within Texas, 2 I.C.C. 63 (1986) which declared that the intrastate shipment of nonsidemarked carpet from Arlington, Texas to other Texas points was interstate commerce, and therefore beyond the jurisdiction of the State, due to the "fixed and persisting intent" of the shipper. See also, State of Texas v. United States, 837 F.2d 184 (5th Cir. 1988), cert.denied, ___ U.S. __, 102 L.Ed.2d 42 (1988), in which the Fifth Circuit denied the ICC's request for a preliminary injunction against State prosecution of an enforcement action against transportation of the carpet by an interstate carrier.

[5] See Quaker Oats Co., No. MC-C-30006 (ICC August 26, 1987), appl. pending sub nom. California Trucking Ass'n v. Interstate Commerce Commission, 9th Cir. No. 87-4739 (ICC declaration that shipments of manufactured products from warehouses within the States of California and Texas to other points in those States constituted interstate commerce beyond State regulation, in reliance on "shipper intent"); Victoria Terminal Enterprises, Inc., No. MC-C-30002 (ICC December 15, 1987 and April 29, 1987), appl. pending sub nom. Steere Tank Lines, Inc. v.

Indeed, as the Petitioners note, there remain petitions for declaratory orders pending before the ICC today which, if granted, would result in further Commission declarations that the intrastate movement of goods is beyond State jurisdiction. (Pet. at 16-17). As the Petitioners further note, the Commission has yet to "declare" in any of these cases that the transportation at issue is intrastate in character; the only petitions it has dismissed have failed on procedural grounds. Id.

These cases have fallen into a

Interstate Commerce Commission, 5th Cir. No. 88-4001, (ICC declaration that intrastate shipment of bulk fertilizer from terminals in Texas to other Texas points was interstate commerce--despite prior interstate shipment by exempt barge to terminals--due to shipper intent); Bigbee Transportation, Inc., No. MC-C-30065 (ICC declaration of interstate commerce); James River Corp. No. MC-C-30044 (same). See also, United States Department of Transportation--Petition for Rulemaking, Ex Parte No. MC-182 (1986) (ICC denial of U.S. Department of Transportation petition to commence rulemaking proceeding to resolve "nature of commerce" issues in favor of case-by-case adjudication).

predictable pattern: a shipper or interstate motor carrier files a petition with the Commission under the declaratory order provisions of the Administrative Procedures Act, 5 U.S.C. 554, seeking an ICC ruling that the movement of goods from outside the borders of a State through a warehouse, tank farm, or other distribution facility, and then to instate receivers is entirely interstate in nature, and that therefore, the intrastate leg of the movement is beyond State regulatory authority. Invariably, the petitioner bases its claim on the "fixed and persisting intent" of the shipper to transport its goods in interstate commerce.

In response to a petition, the Commission publishes a brief notice in the ICC Register and the Federal Register indicating that it will accept comments on the petition; however, the Commission always denies requests for discovery or a hearing on the record with cross examination of

witnesses. Instead, as in this case, the Commission finds the proceeding to be "a declaratory order, not an adversary, proceeding", suitable for decision "on the basis of written statements." (Pet. App. at 12). Then, inevitably, the Commission issues its ruling finding that the intrastate transportation at issue is "interstate commerce" based upon "shipper intent." (Pet. App. at 17).

As a result, this case cannot be viewed as an isolated example of a routine administrative ruling limited to motor carrier service provided by one carrier to one shipper; rather, the Commission "declaration" affirmed by the Eighth Circuit is but the first of a broad, national pattern of administrative decisions resulting in the wholesale removal of State authority to regulate intrastate commerce. As such, the case is worthy of this Court's attention, particularly given the important issue of

Federal preemption raised by the Commission's actions, to which we now turn.

2. There can be little doubt that the result, if not the purpose, of the ICC's Matlack proceeding is the preemption of the State of Missouri's authority to regulate the intrastate motor carrier transportation at issue. That the ICC chose to preempt Missouri through a declaratory order issued without benefit of fact finding does not diminish the fact that here, as elsewhere[6], the Commission has found that transportation between points within a State is beyond the authority of the State's regulatory agencies. Yet despite briefing on the issue, the Court of Appeals failed to apply preemption analysis to the Commission's decision. (Pet. App. at 6-8).

The threshold question presented by the ICC's decision is whether Congress granted

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[6] See supra, at fn.4,5.

the Commission the authority to preempt, through declaratory order or otherwise, State regulation of motor carriage which is on its face intrastate in nature. In other words, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede State law". Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986).[7]

In 49 U.S.C. Sec. 10521(b) (Supp. 1987), Congress specifically denied the Commission the authority "to affect the power of a State to regulate intrastate transportation provided by a motor carrier." Under section 10521(a) (Supp. 1987), the ICC's jurisdiction extends only to motor carrier operations between, inter alia, "a place in a State and a place in another State." Therefore, it is

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[7] In its decision, the ICC did not displace State law with Federal law; it preempted Missouri's regulatory authority and substituted no regulation at all. (Pet. App. at 22).

clear from the face of the statute that Congress has created a dual system of motor carrier regulation in which transportation across State lines is regulated by the ICC and transportation within a State is regulated by State authorities.[8]

A similar dual regulatory scheme was under review in this Court's decision in Louisiana, supra. There, the Court held that the Federal Communications Commission (FCC) had no jurisdiction to regulate the depreciation schedules for equipment of telephone utilities used to provide intrastate service. The Court found that through the enactment of 47 U.S.C. sec. 152(b), the Congress had specifically denied the FCC the ability to preempt State regulation of depreciation schedules. 476 U.S. at 371-5. Therefore, the FCC's attempt

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[8] Of course, there is no question that the transportation at issue in this case occurs entirely within the State of Missouri. (Pet. App. at 2).

to preempt State authority was rejected because "a federal agency may pre-empt State law only when and if it is acting within the scope of its congressionally delegated authority." Id. The Court further stated that a federal agency "may not confer upon itself power" to preempt State jurisdiction where Congress has expressly limited the agency's jurisdiction even if the agency believes preemption is necessary to "effectuate a federal policy." Id.

The Court's holding in Louisiana applies with particular force to the action of the ICC here under review; yet the Court of Appeals' opinion ignores this or any decision addressing the preemptive power of Federal agencies. However, just as 47 U.S.C. sec. 152(b) denies the FCC authority to regulate "intrastate communication service by wire", 49 U.S.C. sec. 10521(b) denies the ICC the authority to "affect the power of a State to regulate intrastate transportation provided

by a motor carrier." Both Congressional denials are stated in quite categorical terms; neither provides any exceptions to the specific rule of nonpreemption.

Therefore, while the ICC has undoubted jurisdiction to issue declaratory rulings under 5 U.S.C. sec. 554(e), and while the ICC has primary jurisdiction to interpret federal motor carrier licenses,[9] the Court of Appeals made no finding that Congress intended the Commission to use these powers to preempt State regulatory authority in the teeth of a statute, section 10521(b), which expressly precludes Federal actions which "affect" State regulation. As this Court has stated, an agency such as the ICC has no power to preempt State authority if, as here, Congress has denied it such authority.[10]

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[9] Service Storage & Transfer Co. v. Virginia, 359 U.S. 171, 173 (1959).

[10] The Commission's lack of authority to sanction Matlack's intrastate service does not mean the carrier is forever precluded from transporting Chemtech's goods. Rather,

Louisiana, supra, is not the only recent decision in which this Court has rejected Federal preemption of State regulation of carriers and utilities. In Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985), the Court held that State decisions to accept collective intrastate motor carrier rate proposals do not violate federal antitrust laws in the absence of Congress' explicit intention to limit State regulation of intrastate commerce. In Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 374 (1983), the Court ruled that State regulation of rural electric generating and transmission cooperatives was not implicitly preempted by Federal loan requirements for REA borrowers. In Pacific Gas and Electric

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the carrier need but obtain intrastate operating authority from the State of Missouri enabling it to provide intrastate service. See Pet. at 4, n. 1, noting that Matlack now holds intrastate operating authority obtained from the MDOT.

Company v. State Energy Resource Conservation and Development Commission, 461 U.S. 190 (1983), a State moratorium on new nuclear power plant construction was upheld against claims of preemption grounded on Federal regulation of nuclear plant safety.[11] These cases document the Court's general reluctance to uphold claims of preemption where Congress has not explicitly ordained such preemption, or where, as in this case, Congress has explicitly denied preemptive authority.

The ICC's attempt to preempt Missouri's authority to regulate intrastate motor carriage raises similar principles of federalism reflected in these decisions. Given the broad national importance of this issue, this Court should review the actions

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[11] But see, Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. ___, 101 L.Ed.2d 322 (1988) (State regulation of the prudence of power purchases within a holding company system preempted by Federal regulation of the sale); See also Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

of an agency which seeks to preempt State motor carrier regulation by issuing declaratory rulings in fact-specific cases without benefit of fact finding.

The Court of Appeals' Opinion Conflicts With This Court's Opinion in Atlantic Coast Line Railroad

In 1927, this Court considered facts remarkably similar to those alleged in this case and found that the transportation of bulk commodities from in-State storage and distribution facilities to points within the State of Florida constituted intrastate commerce subject to the ratemaking jurisdiction of the State regulatory commission. Atlantic Coast Line Railroad Co. v. Standard Oil Company of Kentucky, 275 U.S. 257 (1927) (Atlantic Coast Lines).[12] In its

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[12] Atlantic Coast Lines is instructive for an additional reason: there the Court devoted great time and attention to the factual background of the transportation at issue, in sharp contrast to the ICC's refusal

preemptive decision, the ICC appears to accept the basic similarities between the facts in Atlantic Coast Lines and those in its Matlack ruling, finding only one determinative difference: according to the Commission, in Atlantic Coast Lines, "there was no intention at the time of the initial movement of the petroleum products involved that they be destined beyond the storage facilities." Pet. App. at 18. By contrast, according to the Commission, Chemtech, the intrastate shipper of chemicals in this case, intends its chemicals to end their journey at its customers' plants. Id. The difference in "intent" is the sole factor the ICC offered to distinguish its finding of interstate commerce in Matlack from the Supreme Court's intrastate finding in Atlantic Coast Lines. Id. On review, the

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to allow factfinding or a hearing. Compare Atlantic Coast Lines, 275 U.S. at 262-8 with Pet. App. at 11-12.

Eighth Circuit squarely affirmed this reasoning. (Pet. App. at 8).

The Commission's interpretation of Atlantic Coast Lines is wrong. It badly misconstrued this Court's opinion in order to reach the result--preemption of State jurisdiction--it sought. For at least the following reasons, this Court should review the Court of Appeals' affirmance of the Commission's characterization of Atlantic Coast Lines.

First, contrary to the ICC's reading of the case, this Court did not "emphasize" intent as a controlling or dispositive factor in its analysis of intrastate transportation of petroleum in Florida. Rather, the ICC emphasized this factor to the exclusion of any discussion of the striking similarities between the transportation before it and the transportation at issue in Atlantic Coast Lines. Pet. App. at 18-19. In so doing, the ICC ignored the Court's admonition "that the

determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it." 275 U.S. at 268-269. As Petitioners recount (Pet. at 25-6), there are many similarities and few, if any, differences between the commerce at issue in Atlantic Coast Lines and the commerce at issue in this case. By focussing upon one purported difference, the Commission has clearly failed the test set for it by this Court.

Second, and more importantly, the ICC misconstrued the one purported difference between Atlantic Coast Lines and its Matlack decision that it was able to find. The Commission asserts that in Atlantic Coast Lines, the Court found "no intention" to move bulk products interstate, while Chemtech evidences such intent. Pet. App. at 19. Indeed, in its decision, the ICC underscored the language from Atlantic Coast Lines purporting to show this absence of "intent",

which in turn determined the outcome of the Commission's analysis of the character of the intrastate movement at issue. Id.

The underscored language from Atlantic Coast Lines, however, does not support the Commission's effort to distinguish that case from the Missouri situation under consideration in this case. In Atlantic Coast Lines, as one of the many factors under consideration, the Court included the fact that there was no evidence that the parties who sold Standard Oil its supplies of petroleum products ("the sellers" in the underscored language) had any understanding that the products would move beyond Florida ports. In similar fashion, there is no evidence in this case that the sellers of bulk chemicals to Chemtech (see Pet. App. at 43) have any understanding of Chemtech's transportation plans.

By contrast, there is ample evidence that the shipper in Atlantic Coast Lines,

i.e. Standard Oil, did intend its shipments to reach its customers in Florida, just as Chemtech intends its chemicals to reach its customers. For example, 95% of Standard Oil's fuel oil was sold to its customers under contracts predating the oil's shipment to Florida ports. 255 U.S. at 265. Further, the 123 bulk stations in Florida to which Standard Oil's products were delivered were undoubtedly known to it prior to its purchase of bulk supplies. 275 U.S. at 264. The point here is, not surprisingly, that a shipper of bulk commodities such as Standard Oil or Chemtech clearly intends that its products reach its markets. Yet, the Court in Atlantic Coast Lines found this fact insufficient in light of other factors to convert intrastate transportation into interstate commerce. Id.

In short, by ascribing the lack of intent of Standard Oil's sellers to Chemtech, (and not Chemtech's sellers), the Commission

has contorted this Court's language in Atlantic Coast Lines to serve its preemptive purpose. Moreover, there is no indication in Atlantic Coast Lines that the Court would have ruled the other way had it found that Standard Oil's sellers did arrange for or know the ultimate destination of their products. Because the Commission has built its entire case for preemption on shipper intent, and because Atlantic Coast Lines cannot be distinguished from the alleged facts of the Missouri transportation service at issue, either on the intent issue or any other relevant factor, this Court should grant the petition and reverse the Court of Appeals affirmance of the Commission's decision.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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